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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JESSE PEREZ,

Plaintiff,

v.

J. PRELIP, Senior Special Agent
and Officers A. GATES, S.
BURRIS, D. GONGORA, E. HEALY
and G. PIMENTEL,

Defendants.

Case No.: C 13-5359 CW (PR)

ORDER OF SERVICE

Plaintiff Jesse Perez, an inmate at Pelican Bay State Prison (PBSP), filed a pro se civil rights action pursuant to 42 U.S.C. § 1983 alleging that staff at PBSP violated his constitutional rights. Plaintiff has also moved for leave to proceed in forma pauperis (IFP). The Court finds that Plaintiff's IFP application is complete and grants it in a separate Order. The Court addresses Plaintiff's claims.

DISCUSSION

I. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary

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1 relief from a defendant who is immune from such relief. 28 U.S.C.
2 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.
3 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
4 1988).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must
6 allege two essential elements: (1) that a right secured by the
7 Constitution or laws of the United States was violated, and
8 (2) that the alleged violation was committed by a person acting
9 under the color of state law. West v. Atkins, 487 U.S. 42, 48
10 (1988).

11 Liability may be imposed on an individual defendant under 42
12 U.S.C. § 1983 if the plaintiff can show that the defendant's
13 actions both actually and proximately caused the deprivation of a
14 federally protected right. Lemire v. Cal. Dep't Corrections &
15 Rehabilitation, 756 F.3d 1062, 1074 (9th Cir. 2013); Leer v.
16 Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of
17 Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives
18 another of a constitutional right within the meaning of § 1983 if
19 he does an affirmative act, participates in another's affirmative
20 act or omits to perform an act which he is legally required to do,
21 that causes the deprivation of which the plaintiff complains.
22 Leer, 844 F.2d at 633. Under no circumstances is there respondeat
23 superior liability under § 1983. Lemire, 756 F.3d at 1074. Or,
24 in layman's terms, under no circumstances is there liability under
25 § 1983 solely because one is responsible for the actions or
26 omissions of another. Taylor v. List, 880 F.2d 1040, 1045 (9th
27 Cir. 1989); Ybarra v. Reno Thunderbird Mobile Home Village, 723
28 F.2d 675, 680-81 (9th Cir. 1984).

1 II. Plaintiff's Allegations

2 Plaintiff alleges the following. In 2006, Plaintiff filed a
3 lawsuit in the Eastern District of California against multiple
4 Institutional Gang Investigators (IGI) and other employees of the
5 California Department of Corrections and Rehabilitation (CDCR)¹
6 for due process violations arising from the defendants'
7 unconstitutional validation, segregation and placement of
8 Plaintiff in the Secured Housing Unit (SHU) because he was
9 validated as a gang associate. The district court denied the
10 defendants' motion for summary judgment based on qualified
11 immunity and, on October 15, 2010, the defendants appealed this
12 decision. The Ninth Circuit appointed counsel to represent
13 Plaintiff. On October 2, 2012, Plaintiff's attorneys informed him
14 that the defendants expressed an interest in entering into
15 settlement negotiations. Plaintiff's settlement terms included
16 payment of damages and a new initial validation procedure for
17 Plaintiff that followed the new regulations. In return, Plaintiff
18 would dismiss his lawsuit. Plaintiff agreed to negotiate with the
19 defendants. On October 9, 2012, the Ninth Circuit granted the
20 parties' joint motion to postpone oral argument pending settlement
negotiations.

21 On October 10, 2012, the day after the Ninth Circuit granted
22 a continuance, Defendants Officers Gates, Gongora, Healy and
23 Pimentel ordered Plaintiff to come to the front of his cell and
24 "strip down." Officer Gates told Plaintiff they were conducting a
25 cell search. After Officer Gates performed a visual inspection of

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¹None of the Defendants in this lawsuit are defendants in the
28 Eastern District lawsuit.

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1 Plaintiff while he was naked, he ordered Plaintiff to get dressed
2 in his boxer shorts and shower-shoes only. Officer Gates placed
3 Plaintiff in handcuffs and then Officers Gates, Gongora, Healy and
4 Pimentel escorted him to a short distance from a holding cell and
5 took photographs of Plaintiff's face and body. The officers then
6 placed Plaintiff in the same holding cell as his cellmate, inmate
7 Guerrero. Inmate Guerrero told Plaintiff that Officer Healy had
8 asked him if he was into filing lawsuits, too. Inmate Guerrero
9 told Officer Healy, "No," and Officer Healy said, "Good for you,
10 keep it that way."

11 After approximately twenty to twenty-five minutes, Officers
12 Gates and Pimentel returned to the holding cell and ordered
13 Plaintiff and inmate Guerrero to cuff up. Plaintiff told Officer
14 Gates that he needed his property and paperwork because his
15 lawsuit was still pending. Officer Gates replied, "Oh yeah, about
16 that. You might've been able to collect from us but get
17 comfortable because we're going to make sure you stay here where
18 you belong and as for your property, don't worry, we'll get it to
19 you by tomorrow or so."

20 When Plaintiff and inmate Guerrero returned to their cell,
21 they found it completely trashed and their books, papers, folders,
22 envelops, and other items were missing. Plaintiff found a cell
23 search receipt signed by Officers Pimentel, Gates and Gongora
24 indicating that Plaintiff's paperwork was confiscated for review
25 by IGI. The following day, Officer Pimentel returned some of
26 Plaintiff's property along with a cell search receipt which stated
27 that two address books, twelve personal photographs, and three
28 pages of addresses were confiscated. Plaintiff's legal files and
records were disorganized and missing pages.

1 On October 11, 2012, the CDCR issued a memorandum setting
2 forth its new procedures for validating gang members. The new
3 procedures provide that gang associates would no longer be
4 considered for administrative placement into the SHU based upon
5 their validation to a gang, unless there was also disciplinary
6 behavior.

7 On October 21, 2012, Plaintiff was issued a rules violation
8 report (RVR), authorized by Officer Gates, for willfully resisting
9 and obstructing peace officers. Officer Gates falsified this
10 report. Plaintiff plead not guilty at his RVR hearing. The
11 Senior Hearing Officer agreed with Plaintiff, found Plaintiff not
12 guilty and dismissed the RVR.

13 On November 28, 2012, Plaintiff learned that Defendant Prelip
14 had contacted Defendants to set in motion the validation process.
15 This process was purportedly required by the settlement of the
16 Eastern District lawsuit, but the settlement had not been signed
17 at that time.

18 On December 20, 2012, Officer Burris notified Plaintiff that
19 he had completed an investigation into Plaintiff's gang status "as
20 though Plaintiff had never been validated as an affiliate of a
21 prison gang, ensuring due process was met per CDCR policy."
22 However, Officer Burris conducted his investigation under the old,
23 less favorable validation procedures.

24 On January 15, 2013, Officer Burris was required to re-
25 initiate the validation process, and again he used the old,
26 obsolete validation procedure. Plaintiff wrote a written rebuttal
27 to all the source items upon which Officer Burris had relied to
28 find that Plaintiff was a gang associate.

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1 On April 5, 2013, Plaintiff's attorneys in the Eastern
2 District case sent him the settlement agreement for his review.
3 On April 22, 2013, Plaintiff executed the settlement agreement.
4 On June 25, 2013, the Eastern District defendants executed the
5 agreement. On June 26, 2013, Correctional Counselor T. Adams
6 served Plaintiff with a chrono indicating that Officer Burris'
7 gang investigation and findings, which had been performed under
8 the old procedures, complied with the negotiated settlement
9 agreement. Plaintiff contacted Warden Lewis to inform him that
10 the validation procedure violated the terms of the settlement
agreement.

11 On August 1, 2013, Plaintiff's attorneys informed him that
12 the gang validation was not done in accordance with the settlement
13 agreement. They stated that they had discussed the matter with
14 Deputy Attorney General Kenneth T. Roost, opposing counsel in the
15 Eastern District case, who agreed to call his clients to clarify
16 CDCR's obligations under the settlement agreement. Mr. Roost
17 agreed that the validation procedure conducted by Officer Burris
18 did not satisfy CDCR's obligations under the settlement agreement.

19 Even though the new procedures do not require placement in
20 the SHU for validation as a gang associate, Plaintiff has been in
21 the SHU since 2003 because of his gang associate validation.

22 Based on these allegations, Plaintiff asserts a First
23 Amendment retaliation claim and a conspiracy claim against all
24 Defendants.

25 A. First Amendment Retaliation Claim

26 "Within the prison context, a viable claim of First Amendment
27 retaliation entails five basic elements: (1) an assertion that a
28 state actor took some adverse action against an inmate;

1 (2) because of; (3) that prisoner's protected conduct, and that
2 such action (4) chilled the inmate's exercise of his First
3 Amendment rights, and (5) the action did not reasonably advance a
4 legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,
5 567-68 (9th Cir. 2005) (footnote omitted).

6 Construed liberally, Plaintiff alleges a First Amendment
7 retaliation claim against Defendants.

8 B. Conspiracy Claim

9 To state a claim for a conspiracy to violate one's
10 constitutional rights under 42 U.S.C. § 1983, a plaintiff must
11 state specific facts to support the existence of the claimed
12 conspiracy. Olsen v. Idaho State Bd. of Medicine, 363 F.3d 916,
13 929 (9th Cir. 2004) (internal quotation and citation omitted).
14 Conclusory allegations of conspiracy are not enough to support a
15 § 1983 conspiracy claim. Burns v. County of King, 883 F.2d 819,
16 821 (9th Cir. 1989). Rather, a plaintiff must plead with
17 particularity which defendants conspired, how they conspired, and
18 how the conspiracy led to a deprivation of the plaintiff's
19 constitutional rights. Harris v. Roderick, 126 F.3d 1189, 1195-96
20 (9th Cir. 1997). To prove a conspiracy under § 1983, an
21 "agreement or meeting of minds to violate [the plaintiff's]
22 constitutional rights must be shown." Woodrum v. Woodward County,
23 866 F.2d 1121, 1126 (9th Cir. 1989).

24 Although Plaintiff does not specifically allege a meeting of
25 the minds between Defendants, liberally construed his allegations
26 state a claim based on a conspiracy to retaliate against him for
27 exercising his First Amendment rights.

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1 III. Plaintiff's Request for Preliminary Injunction

2 Plaintiff seeks a preliminary injunction requiring Defendants
3 to (1) cease harassing him and retaliating against him; (2) return
4 the property that they confiscated from his cell; and (3) expunge
5 from his file any reference to his validation as a gang member.

6 The decision of whether to grant or deny a motion for
7 preliminary injunction is a matter of the district court's
8 discretion. Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559
9 F.3d 1046, 1052 (9th Cir. 2009). Under the traditional test for
10 granting preliminary injunctive relief, a plaintiff must:

11 (1) establish a strong likelihood of success on the merits;
12 (2) show the possibility of irreparable injury to the plaintiff if
13 the preliminary relief is not granted; (3) show a balance of
14 hardships favoring the plaintiff; and (4) show that granting the
15 injunction favors the public interest. Los Angeles Memorial

16 Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1200 (9th
17 Cir. 1980). Alternatively, a plaintiff may demonstrate either a
18 combination of probable success on the merits and the possibility
19 of irreparable injury, or that serious questions are raised and
20 the balance of hardships tips sharply in his favor. Diamontiney
21 v. Borg, 918 F.2d 793, 795 (9th Cir. 1990). These two
22 formulations represent two points on a sliding scale in which the
23 required degree of irreparable harm increases as the probability
24 of success decreases. Id.

25 Prior to granting a preliminary injunction, however, notice
26 to the adverse party is required. See Fed. R. Civ. P. 65(a)(1).
27 "The notice required by Rule 65(a) before a preliminary injunction
28 can issue implies a hearing in which the defendant is given a fair
opportunity to oppose the application and to prepare for such

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1 opposition." Klaus v. Hi-Shear Corp., 528 F.2d 225, 235 (9th Cir.
2 1975), overruled on other grounds as recognized in Stahl v.
3 Gibraltar Fin. Corp., 967 F.2d 335, 337 (9th Cir. 1992).

4 Immediate injunctive relief, such as a temporary restraining
5 order, may be granted without written or oral notice to the
6 adverse party or that party's attorney only if: (1) it clearly
7 appears from specific facts shown by affidavit or by the verified
8 complaint that immediate and irreparable injury, loss or damage
9 will result to the applicant before the adverse party or the
10 party's attorney can be heard in opposition, and (2) the applicant
11 certifies in writing the efforts, if any, which have been made to
12 give notice and the reasons supporting the claim that notice
13 should not be required. See Fed. R. Civ. P. 65(b). Although
14 Plaintiff swears that the information contained in his complaint
15 is true and correct, and thus the complaint may be deemed an
16 affidavit, and although the pleadings describe Plaintiff's
17 circumstances with a fair amount of specificity, it does not
18 clearly appear from the pleadings that Plaintiff will suffer
19 immediate injury before Defendants can be given an opportunity to
20 respond.

21 In light of these circumstances, the Court orders service of
22 the pleadings, as indicated below, and directs Defendants to
23 respond to Plaintiff's request for a preliminary injunction.

24 Therefore, Plaintiff's request for a preliminary injunction
25 is denied without prejudice. Defendants shall respond to the
26 request for a preliminary injunction in their dispositive motion.
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CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Plaintiff's request for a preliminary injunction is

DENIED.

2. Plaintiff's First Amendment retaliation claim and conspiracy claim against all Defendants are cognizable and will be served. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint (docket no. 1) and all attachments thereto, a copy of this Order and a copy of the form "Consent or Declination to Magistrate Judge Jurisdiction" to PBSP Officers Gates, Burris, Gongora, Healy and Pimentel and Special Agent Prelip. The Clerk shall also mail a copy of the complaint and a copy of this Order to the California Attorney General's Office. Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires them to cooperate in saving unnecessary costs of service of the summons and complaint.

Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of such service unless good cause be shown for the failure to sign and return the waiver forms. If service is waived, this action will proceed as if Defendants had been served on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file an answer before sixty days from the date on which the request for

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1 waiver was sent. (This allows a longer time to respond than would
2 be required if formal service of summons is necessary.)

3 Defendants are advised to read the statement set forth at the
4 foot of the waiver form that more completely describes the duties
5 of the parties with regard to waiver of service of the summons.
6 If service is waived after the date provided in the Notice but
7 before Defendants have been personally served, the answer shall be
8 due sixty days from the date on which the request for waiver was
9 sent or twenty days from the date the waiver form is filed,
10 whichever is later.

11 4. Defendants shall answer the complaint in accordance with
12 the Federal Rules of Civil Procedure. The following briefing
13 schedule shall govern dispositive motions in this action:

14 a. No later than thirty days from the date the answer
15 is due, Defendants shall file a motion for summary judgment or
16 other dispositive motion and opposition to Plaintiff's motion for
17 a preliminary injunction. If Defendants file a motion for summary
18 judgment, it shall be supported by adequate factual documentation
19 and shall conform in all respects to Federal Rule of Civil
20 Procedure 56. If Defendants are of the opinion that this case
21 cannot be resolved by summary judgment, they shall so inform the
22 Court prior to the date the summary judgment motion is due. All
23 papers filed with the Court shall be promptly served on Plaintiff.

24 At the time of filing the motion for summary judgment or
25 other dispositive motion, Defendants shall comply with the Ninth
Circuit's decisions in Woods v. Carey, 684 F.3d 934 (9th Cir.
2012), and Stratton v. Buck, 697 F.3d 1004 (9th Cir. 2012), and
provide Plaintiff with notice of what is required of him to oppose
a summary judgment motion or a motion to dismiss.

1 b. Plaintiff's opposition to the motion for summary
2 judgment or other dispositive motion shall be filed with the Court
3 and served on Defendants no later than twenty-eight days after the
4 date on which Defendants' motion is filed.

5 Before filing his opposition, Plaintiff is advised to read
6 the notice that will be provided to him by Defendants when the
7 motion is filed, and Rule 56 of the Federal Rules of Civil
8 Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (party
9 opposing summary judgment must come forward with evidence showing
10 triable issues of material fact on every essential element of his
11 claim). Plaintiff is cautioned that because he bears the burden
12 of proving his allegations in this case, he must be prepared to
13 produce evidence in support of those allegations when he files his
14 opposition to Defendants' summary judgment motion. Such evidence
15 may include sworn declarations from himself and other witnesses to
16 the incident, and copies of documents authenticated by sworn
17 declaration. Plaintiff will not be able to avoid summary judgment
simply by repeating the allegations of his complaint.

18 c. Defendants shall file a reply brief no later than
19 fourteen days after the date Plaintiff's opposition is filed.

20 d. The motion shall be deemed submitted as of the date
21 the reply brief is due. No hearing will be held on the motion
22 unless the Court so orders at a later date.

23 5. Discovery may be taken in this action in accordance with
24 the Federal Rules of Civil Procedure.

25 6. All communications by Plaintiff with the Court must be
26 served on Defendants, or Defendants' counsel once counsel has been
27 designated, by mailing a true copy of the document to Defendants
28 or Defendants' counsel.

1 7. It is Plaintiff's responsibility to prosecute this case.
2 Plaintiff must keep the Court informed of any change of address by
3 filing a separate paper with the Clerk headed "Notice of Change of
4 Address," and must comply with the Court's orders in a timely
5 fashion. Failure to do so may result in the dismissal of this
6 action for failure to prosecute pursuant to Federal Rule of Civil
7 Procedure 41(b).

8 8. Extensions of time are not favored, though reasonable
9 extensions will be granted. Any motion for an extension of time
10 must be filed no later than fourteen days prior to the deadline
11 sought to be extended.

12 IT IS SO ORDERED.

13 Dated: 4/2/2014

14 
15 CLAUDIA WILKEN
16 UNITED STATES DISTRICT JUDGE